No. 90-1014

In The

Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Do school authorities violate the Establishment Clause by allowing a speaker at a public junior high or high school graduation ceremony to offer an invocation and a benediction that acknowledge a deity?

2. Whether direct or indirect government coercion of religious conformity is a necessary element of an Establishment Clause violation?

THE PARTIES

1. The petitioners in this case, who were the appellants in the court of appeals, are Robert E. Lee, individually and as principal of Nathan Bishop Middle School of Providence, Rhode Island; Thomas Mezzanotte, individually and as principal of Classical High School of Providence, Rhode Island: Robert F. Roberti, individually and as superintendent of the Providence School Department; and Vincent P. McWilliams, Mary Bastastini, Roosevelt Benton, Roberto Gonzalez, Donald Lopes, Jintana Pond, Lisa Powers, Mary Smith, and Julia Steiny individually and as members of the Providence School Committee.

2. The respondent in this case, who was the appellee in the court of appeals, is Daniel Weisman, personally and as next friend of Deborah Weisman.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER

TABLE OF AUTHORITIES – Continued

Page

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 908 F.2d 1090, and is reproduced in the Appendix to the Petition for a Writ of Certiorari at App.1a.

The opinion of the United States District Court for the District of Rhode Island is reported at 728 F.Supp. 68, and is reproduced in the Appendix to the Petition for a Writ of Certiorari at App. 18a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 23, 1990. No petitions for rehearing were filed. The Petition for a Writ of Certiorari was timely filed on December 21, 1990, and was granted on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion."

STATEMENT OF THE CASE

A. The Graduation Ceremony

For many years the Providence School Committee and Superintendent have permitted, but not directed, school principals to include invocations and benedictions in the graduation ceremonies of the city's public junior high and high schools. J.A. 12, 24; App. 19a.[1] As a result, some, but not all, public middle and high schools in Providence have included invocations and benedictions in their graduation ceremonies. J.A. 4, 12-16, 18; App. 19a. Such invocations and benedictions are not written or delivered by city employees, but by members of the clergy invited to participate in these ceremonies for that purpose. J.A. 12-13, 18. The schools provide the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stress inclusiveness and sensitivity in authorizing nonsectarian prayer for public civic ceremonies. J.A. 13, 20-21; App. 19a. The clergy who have delivered these prayers in recent years have included Jewish rabbis and ministers of various Christian denominations. J.A. 12-15.

As the parties have stipulated, attendance at these ceremonies is voluntary, J.A. 18, with parents and friends of the students invited to attend. J.A. 18. The high school graduation ceremonies are usually held off school grounds, while middle school promotion ceremonies usually take place on the premises of the school. J.A. 12-16, 18; App. 19a.

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[1] "J.A." denotes the Joint Appendix. "App." denotes the Appendix to the Petition for a Writ of Certiorari.

Respondent Daniel Weisman's daughter, Deborah, was graduated from Nathan Bishop Middle School, a public junior high school in Providence, in June 1989. J.A. 4-5, 10; App. 19a. Rabbi Leslie Gutterman of the Temple Beth El of Providence delivered the invocation and benediction at the ceremony. J.A. 17; App. 19a.

Four days before the ceremony, respondent sought a temporary restraining order to prevent the inclusion of invocations and benedictions in the graduation ceremonies of the Providence public junior high and high schools.[2] App. 19a. The district court denied the motion the day before the ceremony, due to lack of time to consider it adequately before the scheduled event. App. 19a-20a.

On June 20, 1989, Deborah Weisman and her family attended the scheduled graduation ceremony at Nathan Bishop Middle School. App. 20a. Rabbi Gutterman's invocation addressed a deity at the beginning, and concluded with "Amen."[3] App. 20a. The benediction opened with a reference to God, asked God's blessing, gave thanks to the Lord, and

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[2] Respondent invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343, 2201, and 2202 (1988), as well as the court's pendant and ancillary jurisdiction, J.A. 2.

[3] The invocation, in its entirety, read as follows:

> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN

App. 20a.

concluded with "Amen."[4] The district court characterized both the invocation and the benediction as "examples of elegant simplicity, thoughtful content, and sincere citizenship." App. 20a.

Deborah Weisman entered Classical High School in Providence in September 1989, and she has continued to attend that school since then. J.A. 10; App. 21a. In July 1989, respondent filed an amended complaint in this action, seeking a permanent injunction against invocations and benedictions in future graduation ceremonies of the Providence public junior high and high schools. App. 21a. The district court ruled in favor of respondent and granted the requested relief.

B. The District Court Decision

The district court's Establishment Clause analysis, which the court of appeals majority characterized as "sound and pellucid" and adopted as its own, App. 2a, opened with the observation that under this Court's precedents "God has been ruled out of public education as an instrument of inspiration or consolation" because of "the perceived sensitive nature of the school environment and the apprehended effect of state-led religious activity on young, impressionable minds." App.

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[4] The benediction, in its entirety, read as follows:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone.
>
> Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

App. 20a-21a.

21a-22a. The district court determined that the invocation and benediction failed under the second prong of the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The practice impermissibly advanced religion "by creating an identification of school with a deity." App. 24a. According to the district court, "the Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a. The district court did not reach the other inquiries under *Lemon* – whether the practice had a secular purpose and whether it fostered an excessive entanglement with religion.

The district court expressly declined to follow the Sixth Circuit's reasoning in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), which held that nondenominational invocations and benedictions in public school graduation ceremonies are not *per se* unconstitutional. The *Stein* court had relied upon *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court rejected an Establishment Clause challenge to the Nebraska Legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here, however, concluded that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer." App. 27a. As proof of this point, the district court noted that *Marsh* was the only case since 1971 in which the Court did not apply the *Lemon* test. The district court also noted that application of the *Marsh* analysis in the context of graduation invocations and benedictions would result in courts "reviewing the content of prayers to judicially approve what are acceptable invocations to a deity." App. 27a.

Finally, the district court made clear that Rabbi Gutterman's invocation and benediction were unconstitutional solely because they made reference to a deity:

> [N]othing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies. Counsel for plaintiff conceded at argument, as she must, that if Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on

> June 29, 1989 with one change – God would be left out – the Establishment Clause would not be implicated.

App. 28a. To punctuate the point, the court recast a new version of Rabbi Gutterman's invocation, one cleansed of its references to God and, thus, of its perceived constitutional infirmity. App. 28a.

C. The Court of Appeals Decision

A majority of the Court of Appeals for the First Circuit affirmed, over a dissenting opinion by Judge Campbell. The panel majority simply endorsed the district court's opinion and did not elaborate further. App. 2a.

Judge Bownes concurred separately, concluding that the invocation and benediction violated all three prongs of the *Lemon* test. Noting that "[a] graduation ceremony does not need a prayer to solemnize it," Judge Bownes concluded that the primary purpose of the practice is religious. App. 9a-10a. He also believed that "it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion." App. 10a. The practice fostered an excessive entanglement with religion by virtue of the School Committee's policies of providing guidelines for the composition of nondenominational invocations and of permitting school authorities to select the speakers. App. 10a-11a.

Judge Bownes also found this Court's decision in *Marsh* inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the first Congress approved of legislative prayers." App. 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." App. 11a (quoting *Edwards v. Aguillard*, 482 U.S 578, 583 n.4 (1987)). Thus, Judge Bownes rejected the Sixth Circuit's analysis in *Stein*, and also criticized that court's "troubling" inquiry into the nondenominational content of the challenged invocation. App. 12a. Finally,

Judge Bownes stated that the Establishment Clause would have been offended by Rabbi Gutterman's invocation and benediction even if cleansed of their references to a deity. Noting that invocations and benedictions "are by their very terms prayers and religious," Judge Bownes concluded that the practice "offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." App. 13a.

In dissent, Judge Campbell believed that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities take care to invite speakers representing a wide range of religious beliefs and nonreligious ethical philosophies. App. 16a.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court invalidated state-mandated prayer in the classroom almost 30 years ago in *Engel v. Vitale*, 370 U.S. 421 (1962), it peered down the road to this case, and, contrary to the lower courts here, denied that the constitutional compass it was setting would put the Establishment Clause at odds with the "many manifestations in our public life of belief in God." *Id.* at 435 n.21. The *Engel* Court thus rebuffed Justice Stewart's concern, expressed in dissent, that beginning the school day with prayer is indistinguishable from opening sessions of Congress and this Court with prayer, or from invoking God's blessing at presidential inaugural ceremonies, or from countless other "official expressions of religious faith in and reliance upon a supreme Being" by institutions and officials of the federal government. *Id.* at 450 n.9. According to the *Engel* majority, "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Id.* at 435 n.21.

Notwithstanding the *Engel* majority's confident assessment of the validity of official ceremonial references to a deity, the courts below prohibited any reference to a deity in public school graduation ceremonies on the basis of the

"effects" prong of the *Lemon* tripartite test. Both the court of appeals majority and the district court equated official reference to a deity with endorsement of religion. Because "reference to a deity necessarily implicates religion," the courts below believed that it was a "forgone conclusion" that the "Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a. At the same time, the courts below dismissed *Marsh* as a narrow exception to *Lemon*, extending only to official religious practices, such as legislative prayer, that were well known and broadly accepted when the First Amendment was framed in 1791 – an exception inapplicable here because the origins of public schooling in this country can be traced back only a century and a half.

Under the reasoning of the lower courts in this case, it is clear that all references to a deity, not just invocations and benedictions, must be cleansed from public school graduation ceremonies. Recitations of the Pledge of Allegiance, for example, would be forbidden. Similarly, commencement speakers would have to take care to avoid references to a deity in their remarks to the graduates. The Rev. Martin Luther King's well-known commencement address to the 1961 graduating class of Lincoln University could not, consistent with the ruling below, be delivered at the 1991 graduation ceremony of a Providence public high school.[5]

But this is not all. For the reasoning of the courts below cannot be confined to public school graduation ceremonies. The invocation and benediction at issue in this case are but a single and unremarkable manifestation of the venerable and

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[5] King's speech contained a number of references to the deity, and he concluded his commencement address with the same stirring words later made famous in his "I Have A Dream" speech delivered from the steps of the Lincoln Memorial on August 28, 1963:

> That will be the day when all of God's children, black men and white men, Jews and Gentiles, Catholics and Protestants, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God Almighty, we are free at last!"

Martin Luther King, Jr., Commencement Address, Lincoln University, June 6, 1961 in 31 Negro History Bulletin 10, 15.

broad tradition of official expression of religious values in the public life of the Nation. If the courts below have correctly stated the law, then a staggering variety of ceremonial and familiar practices in our public life must be censored to exclude forbidden references to a deity, just as the district court below revised Rabbi Gutterman's invocation. Indeed, if governmental expression of religious belief is what the First Amendment forbids, Rabbi Gutterman's manifestly nonsectarian prayers at Nathan Bishop Middle School's graduation ceremony surely pale as a constitutional threat when compared to the Reverend Billy Graham's distinctly sectarian prayer to the Holy Trinity at President Bush's inauguration, a ceremony attended by the constitutional officers of all three branches of the federal government and witnessed by millions of people throughout this country and the world. *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 671-72 n.9 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

By striking down a practice that is as old as American public education itself[6] and that traditionally has been and is now incorporated in the commencement exercises of the vast

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[6] At least as early as May 31, 1804, at the first graduation ceremony of one of the nation's first public universities – the University of Georgia – The Reverend Mr. Marshall offered an invocation, and The Reverend Hope Hull concluded the proceedings with a prayer. A. Hull. *A Historical Sketch of the University of Georgia* 17-19 (1894); *Augusta [Ga] Chronicle,* June 23, 1804. At the University of Virginia, founded by Thomas Jefferson, an "Order of Exercises" dated June 26, 1850, began with prayer. J. Whitehead, *The Rights of Religious Persons in Public Education* 210 (1991). Indeed, the academic ceremonies of graduation, dating back before the founding of our country, are largely drawn from religious ceremonies. DuPuy, *Religion, Graduation and the First Amendment: A Threat or a Shadow?,* 35 Drake L. Rev. 323, 358 (1985-1986). In *Stein,* Judge Milburn observed that the courts "can take judicial notice that invocations and benedictions at public school commencements have been a traditional practice since the beginning of public schools in this country." 822 F.2d at 1410 (Milburn, J., concurring).

bulk of schools and colleges throughout the country,[7] the lower courts' ruling forces the candid mind to question the legitimacy of the constitutional doctrine that yields so startling a result. To be sure, we argue in Part II below that the *Lemon* test does not require invalidation of graduation invocations and benedictions. But we cannot conscientiously argue that the lower courts' application of *Lemon* was unreasonable. Indeed, since the granting of the Petition for Certiorari in this case, both the California Supreme Court and the Court of Appeals for the Fifth Circuit have decided the precise issue raised here, one upholding graduation invocations and benedictions under *Lemon* and the other striking them down.[8]

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[7] Today invocations and benedictions are recognized as standard elements of graduation ceremonies. K. Sheard, *Academic Heraldry in America* 71 (1962) ("The commencement program today consists primarily of an invocation, a commencement address, the awarding of earned degrees, the awarding of honorary degrees, and the benediction."). The *Commencement Manual* of the National Association of Secondary School Principals, at 2 (1975) states that "nearly every program includes an invocation and a benediction."

[8] *Compare Jones v. Clear Creek Indep. School Dist.*, No. 89-2638 (5th Cir. April 18, 1991) (Lexis U.S. App. 6746) (upholding graduation invocations and benedictions) *with Sands v. Morongo Unified School Dist.*, No. SO12721 (Cal. May 6, 1991) (Lexis 1724) (invalidating graduation invocations and benedictions). A number of other federal and state courts have considered the issue, and their conclusions have been mixed. Cases upholding graduation invocations and similar practices are: *Stein*, 822 F.2d 1406 (6th Cir. 1987); *Albright v. Board of Educ.*, No. 90-C-639G (D. Utah May 15, 1991); *Grossberg v. Deusebio*, 380 F.Supp. 285, 289 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F.Supp. 1293, 1294-95 (W.D. Pa. 1972); *Wiest v. Mt. Lebanon School Dist.*, 457 Pa. 166, 320 A.2d 362, 365-66, *cert. denied*, 419 U.S. 967 (1974). *See also Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (upholding school board rules outlining school activities during Christmas assemblies); *Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) ("[W]here a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created."); *Bogen v. Doty*, 598 F.2d 1110, 1111 (8th Cir. 1979) (upholding invocations at meetings of county board); *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799 (1968) (upholding invocations at town meetings); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (upholding posting of Ten Commandments in public building); *Opinion of the Justices*, 108 N.H. 97, 226 A.2d 161 (1967) (bill requiring the posting of "In God We Trust" in public

(Continued on following page)

The division among the lower courts on the issue of graduation prayer, however, is far from atypical in the jurisprudence that has developed under *Lemon's* tripartite test. Since its inception, the *Lemon* test has spawned a cacophony of conflicting decisions in the lower federal courts, particularly in cases involving practices with historical sanction.[9] And candor requires us to add, respectfully, that the

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(Continued from previous page)

school classrooms would be constitutional). Cases invalidating graduation invocations and similar practices are: *Lundberg v. West Monona Community School Dist.*, 731 F.Supp. 331 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F.Supp. 531 (S.D. Iowa 1985); *Doe v. Aldine Indep. School Dist.*, 563 F.Supp. 883 (S.D. Tex. 1982); *Bennett v. Livermore Unified School Dist.*, 193 Cal. App.3d, 1012, 238 Cal. Rptr. 819 (1987); *Kay v. David Douglas School Dist.*, 79 Or. App. 384, 719 P.2d 875 (1986), *rev'd on other grounds*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, 484 U.S. 1032; *see also North Carolina Civil Liberties Union v. Constangy*, 751 F.Supp. 552 (W.D.N.C. 1990) (judge's practice of opening daily sessions with recitation of brief prayer was unconstitutional).

[9] Challenges to religious imagery included in city seals illustrate this point, for such seals commonly are designed near in time to a city's founding and reflect the distinctive social, cultural, geographic, or historical roots of the community. For example, in *Johnson v. Board of County Commissioners*, 528 F.Supp. 919 (D.N.M. 1981), *rev'd sub nom. Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (*en banc*), the district court rejected an Establishment Clause challenge to a city seal, concluding that it did not have the effect of impermissibly advancing religion because it was "an iconographic illustration of the rich cultural heritage of Bernalillo County." 528 F.Supp. at 924. The Tenth Circuit nevertheless found the district court's analysis to be clearly erroneous, driven by its understanding of the *Lemon* "effects" test to observe that a "person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were the Christian police. . . . " 781 F.2d at 782. *See also Harris v. City of Zion*, 927 F.2d 1401, 1403-04 (7th Cir. 1991) (holding unconstitutional Zion's nearly century-old seal); *id.* at 1423 (Easterbrook, J., dissenting) ("Zion's seal has been in use for 89 years without stifling religious diversity. . . . Not one resident of Zion other than Harris has expressed concern."); Brief for Liberty Counsel as *Amicus Curiae* 2-18 (reviewing "chaotic, conflicting decisions in the lower courts" under the *Lemon* test).

anomalies spawned by *Lemon* have not been limited to the inferior federal courts.[10] Not surprisingly, a majority of the Justices of this Court have expressed dissatisfaction with aspects of the *Lemon* test.[11]

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[10] This Court has itself admitted to the "considerable internal inconsistency" in its opinions involving the Religion Clauses, *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970), and confessed that under *Lemon* it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Public Educ. v. Regan*, 444 U.S. 646, 662 (1980). *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (setting out examples of the difficulty the Court has had in "making the *Lemon* test yield principled results"). Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 316-17 (1986) ("This scatter-pattern of decisions is the combined product of the tripartite *Lemon* test and the Court's occasional desire to provide an escape from the straitjacket that an honest application of *Lemon* would force upon society. . . . "); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980) (noting "the absence of any principled rationale" in the Court's Religion Clause jurisprudence); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 20 (1978) ("Judicial discretion, rather than constitutional mandate, controls the results."). In particular, a literal application of *Lemon* would seem plainly to invalidate a number of practices which this Court has held are required by the Free Exercise Clause. *Compare Sherbert v. Verner*, 374 U.S. 398 (1963) (government may not burden an employee's free exercise rights by failing to accommodate his Sabbath observance) *with Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (statute that provides employees with unqualified right not to work on their Sabbath violates the Establishment Clause).

[11] *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. . . . The threefold test of *Lemon I* imposes unnecessary, and . . . superfluous tests for establishing [a First Amendment violation]."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong").

More telling, however, is the dissatisfaction with *Lemon* implied in the Court's decision in *Marsh*. In upholding the Nebraska Legislature's practice of opening its sessions with a prayer offered by a paid chaplain, the *Marsh* Court did not attempt the exceedingly difficult task of justifying the practice at issue under the *Lemon* test. Indeed, Justice Brennan observed in dissent that, "if the Court were to judge legislative prayer through the unsentimental eyes of our settled doctrine [i.e., the *Lemon* test], it would have to strike it down as a clear violation of the Establishment Clause." *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). But the *Lemon* test not only is unsentimental, it is indifferent to our Nation's heritage of official ceremonial acknowledgments of religious faith, and woodenly applying its formulaic prescription would have required the *Marsh* majority to ignore the common-sense proposition on which its decision was largely premised:

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain [to deliver opening prayers] for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Marsh, 463 U.S. at 790. Thus, in *Marsh*, and we submit, in this case, the *Lemon* test was ill-suited to assist the Court in its essential task, which Justice Brennan well described in *Abington School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring): "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."

In the pages that follow, we demonstrate that the history surrounding the framing and ratification of the Establishment Clause reveals two points of controlling significance in this case. First, by making particular provision for religious liberty within the otherwise general First Amendment protection of expression, the Framers did not intend to deprecate or restrain religious expression in the life of the nation. The

Establishment Clause was not intended to operate as some sort of constitutional gag order, enjoining public officials and their invitees to omit any reference to God from civic ceremonies. To the contrary, public ceremonial acknowledgments of faith in God were welcomed and encouraged by the Founders; they, certainly no less than contemporary Americans, were "a religious people whose institutions presuppose[d] a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

Second, the history of the First Amendment reveals *why* the Founders engaged in and encouraged official ceremonial expressions of religious faith: such references did not involve the government's coercive powers. The struggle for religious freedom in this country was animated by an overriding philosophical premise – that matters of conscience can be influenced only by reason, not force, and that in appealing to reason, "all men [should] be free to profess, and by argument to maintain, their opinion in matters of religion." *Virginia, Act for Establishing Religious Freedom* (1785), in 5 *The Founders' Constitution* 84, 85 (P. Kurland & R. Lerner eds. 1987) (hereinafter "Kurland"). The Founders did not fear *expression* of religious values by public officials; they feared *coercion* of religious values by public officials. The First Amendment was designed by the Framers to protect only against the latter.

ARGUMENT

I. The Graduation Prayers Here Did Not Violate The Establishment Clause Because They Did Not Involve Government Coercion Of Religious Conformity

A. Government Coercion Of Religious Conformity Is A Necessary Element Of An Establishment Clause Violation

1. The Philosophy Of The Founders

Among the Founders, Madison and Jefferson were "the architects of our principles of religious liberty." *American Jewish Congress v. City of Chicago,* 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). The blueprint, however, was in large part provided by John Locke, probably the

foremost exponent of the classical liberal philosophy of government that animated the Framers generally, and Jefferson particularly. In his *Letter Concerning Toleration,* Locke distinguishes between government coercion relating to religion, which he deemed unjustifiable, and government expression or persuasion concerning religion, which he deemed unobjectionable. Locke wrote:

> The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind. . . . Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.
>
> It may indeed be alleged that the magistrate may make use of arguments, and thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. . . . Every man has commission to admonish, exhort, convince another of error, and, by reasoning, to draw him into truth; but to give laws, receive obedience, and compel with the sword, belongs to none but the magistrate. And upon this ground, I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind.[12]

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[12] Locke, *A Letter Concerning Toleration* (1684), in Kurland, *supra* p. 14, at 52, 53. St. George Tucker in *Blackstone's Commentaries* (1803), in Kurland, *supra* p. 14, at 96, later recognized a similar distinction between unjustifiable religious coercion and unobjectionable official persuasion or recognition of religion. Tucker cites as "an axiom, concerning the human mind," that "religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence." He elaborated:

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These views on religious liberty form a common thread running throughout Madison's and Jefferson's writings on the subject, and are reflected perhaps nowhere more distinctly than in Jefferson's *Notes on the State of Virginia.* Jefferson, *Notes on the State of Virginia,* Query 17, 157-61 (1784) (hereinafter "*Notes*"), in Kurland, *supra* p. 14, at 79-80. Jefferson opened by recounting that this country was settled largely by immigrants fleeing the coercion, indeed persecution, of English laws demanding their conformity to and support of the established Anglican Church. Many of those settlers, however, including those who established Virginia, "shewed equal intolerance" of differing religious faiths once they became "[p]ossessed . . . of the powers of making, administering, and executing the laws. . . . " *Id.*[13]

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> In vain, therefore, may the civil magistrate interpose the authority of human laws, to prescribe that belief, or produce that conviction, which human reason rejects. . . . The martyr at the stake, glories in his tortures, and proves that human law may punish, but cannot convince . . . .

Id. at 96. Tucker further noted, however:

> Statesmen should countenance [genuine religion] only by exhibiting, in their own example, a conscientious regard to it in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens in doing the same.

Id. at 97.

[13] Legal compulsion was the hallmark of establishments in the American colonies, the colonists having adopted many of the practices that inspired their own flights from England and elsewhere in Europe. *See* 6 W. & A. Durant, *The Story of Civilization* 208-20, 501-506, 523-601, 631-41 (1957); L. Pfeffer, *Church, State and Freedom,* 20-30 (rev. 1st ed. 1967). Professor Joseph Brady, in a seminal historical work on the Establishment Clause, quotes historian Marcus W. Jernegan's description of the typical laws establishing state religions:

> The general rule in those colonies having an established church was to require dissenters to support it by paying tithes or taxes, and also to attend the official church services under penalty. They were also frequently required to submit to various tests or oaths, and to subscribe to the creeds and catechisms of the established church. Sometimes the right to settle in a colony, or the privilege of

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In 1776, Jefferson noted, the newly independent Commonwealth of Virginia adopted a Constitution containing a Declaration of Rights with a clause guaranteeing religious liberty.[14] Jefferson complained that in obedience to the Virginia Constitution's guaranty of religious freedom, the legislature had repealed only the prior acts of the English parliament compelling observance of and support for the established English church.[15] The legislature did not repeal prior acts of the colonial assembly that coerced conformity to the Christian religion by, *inter alia,* disqualifying dissenters from holding public office and imposing criminal penalties. Jefferson made clear that the freedom to profess one's religious opinions publicly is integral to the freedom to *have* religious opinions. And the free exercise of the right to form

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> naturalization, or citizenship, or the right to vote and hold office, depended on submission to religious tests.

J. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* 6-7 (1954). *See also* L. Levy, *The Establishment Clause: Religion and the First Amendment* 4 (1987).

[14] The religious freedom clause of Virginia's Declaration of Rights reads as follows:

> That religion, or the duty we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.

Virginia Declaration of Rights, Section 16 (June 12, 1776), Va. Const. art. I, § 16, in Kurland, *supra* p. 14, at 70.

[15] The Anglican Church of England was established in Virginia's original charter in 1606, which required all ministers in the Colony to preach Christianity according to Anglican doctrines. L. Levy, *supra* n.13, at 3. In 1611, the Colony required all citizens to attend church and observe the Sabbath, and enacted severe punishments for blasphemy, sacrilege, and criticism of the doctrine of the Trinity. *Id.* The law also required all to embrace Anglican doctrine, and to pay for the maintenance of Anglican churches and ministers. *Id.* at 3-4. Every clergyman was required to accept the Anglican Thirty-Nine Articles of Faith, and every church was required to follow the liturgy of the Church of England according to the Anglican Book of Common Prayer. *Id.* at 4.

and profess one's religious sentiments causes no injury, while subjecting that right to government coercion causes no good. As Jefferson put it:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. . . . The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg. . . . Constraint may make him worse by making him a hypocrite, but it will never make him a truer man. . . . Reason and free inquiry are the only effectual agents against error. . . . It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion: Whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? . . . Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other. . . . What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. . . . [W]e cannot effect [truth] by force. Reason and persuasion are the only practicable instruments.

Notes, in Kurland, *supra* p. 14, at 79-80.

2. The Fight For Religious Liberty In Virginia

In 1779, Jefferson drafted an "Act for Establishing Religious Freedom." This Court has often recognized that the history surrounding the Virginia General Assembly's enactment in 1786 of Jefferson's bill accurately reflects "the long and intensive struggle for religious freedom in America" and is "particularly relevant in the search for the First Amendment's meaning." *McGowan v. Maryland,* 366 U.S. 420, 437 (1961). The Religious Freedom Act was aimed specificially at government coercion in the form of (1) taxation for the

support of religion; (2) religious tests for holding public office; and (3) government restraints on the propagation of religious beliefs. The Act's substantive provision reads as follows:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Virginia, Act for Establishing Religious Freedom, in Kurland, *supra* p. 14 at 85.

As Judge Easterbrook has noted, the Act "does not protest government use of persuasion on matters religious; it is concerned with compulsion alone." *American Jewish Congress,* 827 F.2d at 135 (Easterbrook, J., dissenting). Indeed, far from protesting government use of persuasion on religious matters, the Act guarantees to "all men" freedom of religious expression. "All men" clearly includes those holding public office, for an essential purpose of the Act was to render religious belief and expression irrelevant to one's "civil capacities," such as the ability to seek and hold public office.[16] That government and government officials are no

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[16] While the language of the Act's substantive provision admits of no doubt on this point, the preamble speaks directly to the issue as well:

> [O]ur civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; . . . therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; . . . it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it . . . .

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less free than ordinary citizens to express religious opinions is thus clear from the Act's substantive protections. But if any doubt persists on this point, it is foreclosed by the Act's preamble, which itself contains a full-bodied expression of religious belief, arguing in effect that the principles reflected in the Act were Divinely inspired. The preamble provides in pertinent part:

> Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . .

Virginia, Act for Establishing Religious Freedom, in Kurland, *supra* p. 14, at 84. If Rabbi Gutterman's invocation in this case violated the Establishment Clause, then Virginia's enactment of the Act for Establishing Religious Freedom was itself an establishment of religion, and if reenacted today, Jefferson's preamble would have to be deleted. *See American Jewish Congress,* 827 F.2d at 136 (Easterbrook, J., dissenting).

Jefferson's Religious Freedom Act was not enacted until 1786, in the aftermath of Patrick Henry's unsuccessful attempt to pass "A Bill Establishing A Provision for Teachers of the Christian Religion" ("Assessment Bill").[17] Henry's bill was "nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777." *Everson v. Board of Educ.*, 330 U.S. 1, 36 (1947) (Rutledge, J., dissenting). The Assessment Bill permitted each taxpayer to designate which Christian church would receive his payment, and in default of a designation,

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Virginia, Act for Establishing Religious Freedom, in Kurland, *supra* p. 14, at 84.

[17] The Bill appears in *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947) (Appendix to Opinion of Rutledge, J., dissenting).

the taxes were paid into a public fund to aid "seminaries of learning." *Id.*

Madison led the opposition to the Assessment Bill, briefing the arguments against it in his famed *Memorial and Remonstrance Against Religious Assessments.*[18] Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) in Kurland, *supra* p. 14, at 82-84. The *Memorial and Remonstrance* is a bill of particulars against the use of government power to coerce support of religion. Madison's main arguments against the Assessment Bill sprang from a common theme, stated in his preamble: that the Bill, "if finally armed with the sanctions of a law, will be a dangerous abuse of power . . . " *Id.* at 82.

In his lead argument against the measure, Madison invoked the Lockean postulate, enshrined in Virginia's Declaration of Rights, " 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' " *Id.* ¶ 1. Freedom of religion, being "in its nature an unalienable right," wrote Madison, is not abridged by one's membership in "Civil Society," and thus is subject neither to "the will of the majority" or "to that of the Legislative Body." *Id.* ¶¶ 1, 2. Madison warned that a government "which can *force* a citizen to contribute three pence only of his property for the support of any one establishment, may *force* him to conform to any other establishment in all cases whatsoever." *Id.* ¶ 3 (emphasis added). He argued further that "*compulsive* support" of religion frustrates rather than maintains "the purity and efficacy of Religion," noting that historically religion had flourished "without the support of human laws," while "ecclesiastical establishments" had led to religious "superstition, bigotry and persecution." *Id.* at 82-83 ¶¶ 4, 6, 7 (emphasis added). Finally, Madison warned against arming the proposed Bill "with the *force* of a law," and argued that "attempts to

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[18] Justice Rutledge characterized the *Memorial and Remonstrance* as "the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.' " *Everson,* 330 U.S. at 37 (Rutledge, J., dissenting).

enforce by legal *sanctions*" measures as widely unpopular as the Assessment Bill would "tend to enervate the laws in general." *Id.* at 83-84 ¶¶ 11, 13 (emphasis added).

For Madison, the evil of the Assessment Bill was its proposed use of government power to coerce support of religion, which he saw as the *sine qua non* of an "establishment." Nowhere in his *Memorial and Remonstrance* did he voice concern about expression of religious beliefs by government or its officials. To the contrary, not only did he extol the "freedom to embrace, to profess and to observe" religious beliefs (*id.* at 82 ¶ 4), he exercised that freedom in the *Memorial and Remonstrance* itself, closing it with a prayer to "the Supreme Lawgiver of the Universe."[19]

The *Memorial and Remonstrance* not only brought about the defeat of the Assessment Bill, it also generated popular support for Jefferson's Religious Freedom Bill, which passed in January 1786. Many years later, Madison praised the Religious Freedom Bill as "a true standard of Religious liberty," describing it as follows: "Here the separation between the authority of human laws, and the natural rights of Man excepted from the grant on which all political authority is founded, is traced as distinctively as words can admit, and the limits to this authority established with as much solemnity as the forms of legislation can express." Madison, *Detached Memoranda* (1817) (hereinafter "*Detached Memoranda*"), in Kurland, *supra* p. 14, at 103.

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[19] Madison prayed

> [t]hat the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other guide them into every measure which may be worthy of his blessing, may redound to their own praise and may establish more firmly the liberties, the prosperity, and the happiness of the Commonwealth.

Id. ¶ 15.

3. The Framing Of The Establishment Clause

Following hard on the heels of this experience in Virginia were the debates in the First Congress over the Establishment Clause of the First Amendment. Madison, a member of the House of Representatives from Virginia, again played the leading role. The debate in the States over ratification of the Constitution had centered on the Constitutional Convention's failure to include a bill of rights. Opposition to the Constitution was led by the Anti-Federalists, who believed that a bill of rights was essential to preserving individual liberties against encroachment by the national government. Supporters of ratification, the Federalists, argued that a bill of rights was unnecessary because the national government lacked the delegated power to act in a manner that would violate their religious and other civil liberties. Still, two states – Rhode Island and North Carolina – refused to ratify the Constitution in the absence of amendments in the nature of a bill of rights, and three of the ratifying states – New Hampshire, New York, and Virginia – proposed that an amendment guaranteeing religious freedom be offered by the First Congress.[20] 3 J. Elliot, *Debates on the Federal Constitution* 659 (1891); 1 *id.* at 328.

Madison took the lead in introducing a set of proposed amendments in the House of Representatives, including the following proposal concerning religious freedom: "The Civil Rights of none shall be abridged on account of religious

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[20] The Virginia proposal was typical:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force and violence and therefore all men have an equal, natural and inalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

Virginia Ratifying Convention, Proposed Amendments (1788), in Kurland, *supra* p. 14, at 89. North Carolina proposed an identical amendment, and New York and Rhode Island quite similar ones. *See* 4 J. Elliot, *Debates on the Federal Constitution* 244, 334 (1891). New Hampshire proposed an amendment stating: "Congress shall make no laws touching religion or to infringe the rights of conscience." 1 *id.* at 362.

belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 451 (J. Gales ed. 1834). Madison's proposals were referred to a Select Committee consisting of Madison and ten others. The Committee ultimately reported out the following language: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729.

The debate over this proposal in the House was not extensive. Madison's comments make clear, however, that the purpose of the proposed amendment was to protect against government *coercion* of religious observance or support. Madison advised his colleagues that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* at 730, in Kurland, *supra* p. 14, at 93 (emphasis added). Representative Benjamin Huntington agreed with Madison's understanding of the amendment's meaning, but feared that "others might find it convenient to put another construction upon it." He suggested that it might be construed to prevent enforcement in federal court of private pledges to contribute to the support of a minister or a church building. *See id.* at 730-31, in Kurland, *supra* p. 14, at 93. Madison answered that insertion of the word "national" before the word "religion" in the proposal would "point the amendment directly to the object it was intended to prevent." *Id.* at 731, in Kurland, *supra* p. 14, at 93. That object, according to Madison, was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." *Id.*, in Kurland, *supra* p. 14, at 93 (emphasis added).[21]

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[21] Representative Elbridge Gerry attacked Madison's suggested insertion of the word "national" as supporting the claim of the Anti-Federalists, made in state ratifying conventions, that the Federalists favored a "national" government rather than a federal one. Madison withdrew his suggestion. 1 Annals of Congress 731, in Kurland, *supra* p. 14, at 93. Representative Samuel Livermore of New

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The debates in the Senate were secret, and there is no record of any further debate on the Religion Clauses in the House. *Wallace v. Jaffree,* 472 U.S. at 97 (Rehnquist, J., dissenting). And while the proposed amendment was revised several times before the House and Senate finally agreed on the language that ultimately became the First Amendment (*see id.*), none of the changes affected Madison's points about the intended meaning of the Establishment Clause. *American Jewish Congress,* 827 F.2d at 136 (Easterbrook, J., dissenting).

Thus according to the chief architect and sponsor of the First Amendment in the First Congress, the Establishment Clause was designed to protect against laws[22] *compelling* conformity in matters of religion. No one disagreed with Madison's statements concerning the intended meaning of the provision. Indeed, the debate in the House over the wording of the amendment did not question the intended meaning of the amendment – on that issue Madison's view was accepted as common ground. Rather, the debate over the Establishment Clause focused on the concern that the proposed language might be construed to *go beyond* the meaning ascribed to it by Madison.

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Hampshire moved that the proposed language be altered to echo that proposed by his state's ratifying convention: "Congress shall make no laws touching religion, or infringing the rights of conscience." *Id.* Livermore's motion carried. *Id.*

[22] Indeed, the use of the word "law" in the Establishment Clause underscores the Framers' intent to prohibit coercive practices. ("Congress shall make no *law* . . . . "). A law by definition involves a binding obligation backed by compulsion. *Zwerling v. Reagan,* 576 F. Supp. 1373, 1376-78 (C.D. Cal. 1983) ("Fundamental to the existence of a law is the obligation it creates and the sanction it imposes. It is a matter of compulsion and does not take the nature of a plea, suggestion or request."). *See also American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 356 (1909) ("Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts."); *United States Fidelity & Guaranty Co. v. Guenther,* 281 U.S. 34, 37 (1930) (defining law "as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force.").

But whatever else may be said about the views of the First Congress concerning the meaning of the Establishment Clause, this much is clear: the Framers of the First Amendment did not conceive that constitutional protection against government establishments of religion would forbid the expression of religious opinions by government or its officials. While there was no discussion on this issue among the Founders at the time of the framing of the First Amendment, evidence of their views on it abounds nonetheless. For "their actions reveal their intent." *Marsh,* 463 U.S. at 790.

4. The Conduct Of The Founders

As this Court has often recognized, our Nation's tradition of official ceremonial expressions of religious beliefs dates back to its inception. *See, e.g., March v. Chambers,* 463 U.S. at 787-88; *Lynch v. Donnelly,* 465 U.S. 668, 673-74 (1984). America was founded on an appeal "to the Supreme Judge of the world" and to "the laws of nature and of nature's God." The Declaration of Independence also proclaimed that all men "are endowed by their Creator with certain inalienable rights," and relied on "the protection of Divine Providence." George Washington, in his first inaugural address, sought the blessings of God, "that Almighty Being" and "the Great Author of every public and private good." Indeed, Washington thought "it would be peculiarly improper to omit in [his] first official act [his] fervent supplications to that Almighty Being who rules over the universe . . . ."[23] Almost without exception, Washington's successors in office, up to and including President Bush,[24] have included in their inaugural

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[23] George Washington, First Inaugural Address, April 30, 1789, in *Inaugural Addresses of the Presidents of the United States from George Washington, 1789 to George Bush, 1989* at 1, 2 (Bicentennial ed. 1989) (hereinafter cited as "*Inaugural Addresses of the Presidents*").

[24] And my first act as President is a prayer. I ask you to bow your heads:

> Heavenly Father, we bow our heads and thank You for Your love. Accept our thanks for the peace that yields this day and the shared faith that makes its continuance likely. Make us strong to do Your

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addresses statements of religious sentiment and supplications for God's assistance in discharging their official obligations. Indeed, the inaugural addresses of both Thomas Jefferson (at both his first[25] and second[26] inaugural ceremonies) and James Madison[27] contain moving expressions of religious faith.

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> work, willing to heed and hear Your will, and write on our hearts these words: "Use power to help people." For we are given power not to advance our own purposes, nor to make a great show in the world, nor a name. There is but one just use of power, and it is to serve people. Help us remember it, Lord. Amen.

George Bush, Inaugural Address, January 20, 1989, in *Inaugural Addresses of the Presidents, supra* n.23, at 345, 346.

[25] Kindly . . . enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man: acknowledging and adoring an overruling Providence, which by all its dispensations provides that it delights in the happiness of man here and his greater happiness hereafter . . . . And may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue of your peace and prosperity.

Thomas Jefferson, First Inaugural Address, March 4, 1801, in *Inaugural Addresses of the Presidents, supra* n.23, at 13, 15, 17.

[26] I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

Thomas Jefferson, Second Inaugural Address, March 4, 1805, in *Inaugural Addresses of the Presidents, supra* n.23, at 18, 22-23.

[27] In these my confidence will under every difficulty be best placed, next to that which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose

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At the conclusion of Washington's inauguration ceremony, the new President and both Houses of Congress attended a religious service conducted by the First Episcopal Bishop of New York at St. Paul's Chapel in New York City, in accordance with a joint congressional resolution providing for the service. *See* A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964).

On the day after the House of Representatives of the First Congress voted to adopt the Establishment Clause, the House adopted a resolution requesting President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch,* 465 U.S. at 675 n.2. Washington responded by proclaiming November 26, 1789, as a day of thanksgiving in which to offer "our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* Washington issued a similar proclamation of thanksgiving in 1795, and this practice was followed by President John Adams, who issued two such proclamations, and President Madison, who issued four.[28] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 53 (1982). This tradition has been continued throughout our history by virtually every President, with the exception of Jefferson.[29]

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> power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.

James Madison, First Inaugural Address, March 4, 1809, in *Inaugural Addresses of the Presidents, supra* n.23, at 25, 28.

[28] Madison later questioned the wisdom, not the constitutionality, of his practice as President of issuing Thanksgiving proclamations. *See Detached Memoranda,* in Kurland, *supra* p. 14, at 105; *American Jewish Congress,* 827 F.2d at 136 (Easterbrook, J., dissenting).

[29] We discuss Jefferson's refusal to issue such proclamations at pp. 32-34, *infra.*

Lynch, 465 U.S. at 675 n.2; 3 A. Stokes, *Church and State in the United States* 180-93 (1950).

The First Congress also adopted the policy, followed ever since, of opening daily sessions of the House and Senate with prayers by an official chaplain. *Marsh,* 463 U.S. at 787-88. Madison was a member of the House Committee that proposed the policy, and he voted in favor of the bill authorizing it. *Id.* at 788 n.8.[30] The chaplaincy practice was also followed by the Continental Congress from its inception in 1774. *Marsh,* 463 U.S. at 786-87.

Congress's early chaplains not only opened daily sessions with prayer, they conducted Sunday worship services in the hall of the House of Representatives. Beginning around 1800, the House of Representatives authorized the use of its hall for regular Sunday religious services performed by congressional chaplains or by visiting ministers. 1 Stokes, *Church and State in the United States* 499-507 (1st ed. 1950). Both Jefferson and Madison often attended these services while serving as President. *Id.* at 499, 501.

Nor did the First Congress hesitate to reenact the Northwest Ordinance of 1787, which provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Wallace v. Jaffree,* 472 U.S. at 100 (Rehnquist, J., dissenting).

Ceremonial references to God have not been limited to the political branches of the federal government. This Court's own sessions have been opened by the Crier with the invocation "God save the United States and this Honorable Court" at least since the time of Chief Justice Marshall. *See Engel v. Vitale,* 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). It is also noteworthy that Chief Justice John Jay, in March 1790

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[30] Madison subsequently came to the view that paying congressional chaplains out of taxpayer funds violated the Establishment Clause. *See Detached Memoranda,* in Kurland, *supra* p. 14, at 104. Madison's constitutional objection to the chaplaincy system was apparently limited to the issue of tax support, although he also criticized the practice of opening Congress' sessions with a prayer by a chaplain as a violation of "equal rights." *See id.*

advised district court Judge Richard Law that the custom in New England courts of having a clergyman attend court sessions as chaplain "should in my opinion be observed and continued" during sessions held by Chief Justice Jay as circuit justice. 2 *The Documentary History of the Supreme Court of the United States, 1799-1800* 13 (1990).

5. The Founders' Understanding of The Establishment Clause

What this Court said in *Marsh* is equally apt here: "In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Marsh,* 463 U.S. at 790.[31] Against the historical backdrop described above, it cannot reasonably be maintained that the Framers of the First Amendment intended the Establishment Clause to prohibit official expressions of religious sentiments – a practice that they freely engaged in and

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[31] The courts below evaded the lessons of the framing of the First Amendment by denying the relevance of that history to this case. They dismissed *Marsh* as a narrow exception to *Lemon* for official religious practices, such as legislative prayer, that were common in 1791 and were specifically approved by the First Congress. Thus, because public education did not become a part of our accepted traditions until the mid-19th Century, the *Marsh* case, according to the courts below, is inapposite here. But the history of legislative prayer not only reveals that the Framers of the Establishment Clause likely did not intend the Clause to forbid that specific practice; it also provides broader insight into what the First Congress intended the words "an establishment of religion" to mean. *See County of Allegheny,* 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part). In other words, the history surrounding the framing of the Establishment Clause (or any other constitutional provision) has both a retail and a wholesale significance. And any interpretation of the Clause faithful to its intended meaning "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.* The contrary view advanced in this case by the courts below is on the order of saying that the Fourth Amendment does not reach electronic surveillance, that the Commerce Clause does not embrace interstate motor carriage, or that the First Amendment does not extend to the electronic media.

encouraged as public officials before, during, and after the framing of the Amendment itself.[32] To the contrary, this conduct of the Founders reflected their intentions concerning the Establishment Clause, which in turn reflected their philosophical beliefs concerning the proper relationship between religion and government.

As previously discussed, those who led the fight for religious freedom that culminated in ratification of the First Amendment valued truth above all else, in spiritual no less than political matters. "Truth can stand by itself," said Jefferson, "error alone . . . needs the support of government." *Notes,* in Kurland, *supra* p. 14, at 80. The Founders knew that an "establishment" of religion could neither arise nor survive without government coercion, and that it would perish wherever men were "free to profess, and by argument to maintain, their opinion in matters of religion." *Virginia, Act for Establishing Religious Freedom,* in Kurland, *supra* p. 14, at 85. A simple statement of religious belief cannot coerce adherence by others. In Jefferson's vivid formulation, "[i]t neither picks my pocket nor breaks my leg." *Notes,* in Kurland, *supra* p. 14,

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[32] Contrary to Judge Bownes' suggestion, App. 11a, this Court did not hold in *Edwards v. Aguillard,* 482 U.S. 583 n.4, that the "historical approach" taken in *Marsh* is inapplicable in the public schooling context. After noting that legislative prayer was upheld in *Marsh* on the basis of "historical acceptance of the practice," the *Edwards* Court stated: "Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the constitution was adopted." *Id.* This observation means only that because public education did not exist at the time of the Founding, there can be no historical acceptance of a practice relating to public education that would support the constitutionality of the practice. The observation in *Edwards* surely does not stand for the remarkable proposition that the constitutional history surrounding practices common in 1791 is without significance to the resolution of constitutional challenges to closely analogous innovations in 1991. In addition, it seems doubtful that the courts below would find that the historical circumstances surrounding the framing of the Establishment Clause limit the practices *prohibited* by the Clause in the same manner that the courts below believe those historical circumstances limit the practices *permitted* under the Clause. In other words, the courts below no doubt would agree that the First Amendment *prohibits* modern methods of establishing a religion no less than it prohibits ancient ones.

at 80. This is no less true of the religious expressions of government and its officials, so long as neither employs the state's coercive powers.

In none of the historical examples discussed above did the religious expressive activities involve an attempt to use government power to *coerce* religious conformity. No one was required to attend the inaugural ceremonies of Presidents Washington, Jefferson, or Madison, and those who chose to attend were in no way required to accept or support the religious sentiments expressed by the speakers. No one was required to give thanks on the day designated for that purpose in the proclamations of President Washington and his successors, and those who chose to do so were in no way required to accept or support the religious beliefs professed by the proclamation's author. No one, legislator or citizen, was required to attend the chaplain's invocations opening sessions of Congress, nor to accept or support the religious beliefs expressed by the chaplain.[33] Because these expressive activities did not *coerce* religious conformity, the Founders engaged in them without fear that they violated the Establishment Clause.

Thus, the history surrounding the proposal, framing, and ratification of the Establishment Clause leads to this conclusion: the "wall of separation" between religion and government erected in the First Amendment was not understood or intended by the Framers to be a quarantine, so thoroughly isolating God from civic life that even acknowledgments of His existence were forbidden. Rather, the Establishment Clause was intended to separate, and thus to protect, religion from the *coercive* power of government.

6. Jefferson's "Wall of Separation"

None of the Founders disagreed with this understanding of the Establishment Clause, including the author of the

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[33] Indeed, Madison noted that the "daily devotions" opening congressional sessions had "degenerat[ed] into a scanty attendance, and a tiresome formality." *Detached Memoranda,* in Kurland, *supra* p. 14, at 104.

famous "wall of separation" metaphor. Indeed, Jefferson's letter to the Danbury Baptist Association is a concise summary of the central philosophical precepts on which he had elaborated at greater length in his earlier *Notes on the State of Virginia, see supra* at 16-18.[34]

The nature of Jefferson's "wall of separation between Church and State" is illuminated by the following statement appearing earlier in the same sentence of his Danbury letter: "the legislative powers of government reach actions only, and not opinions . . . . " Danbury Letter, in Kurland, *supra* p. 14, at 96. This statement, versions of which recur throughout Jefferson's writings on this subject, makes clear his view that the evil from which the church was constitutionally separated was not the State *qua* state, but rather the State's "legislative powers" – its powers to coerce. One cannot read Jefferson's other, more elaborate writings on the relationship between religion and government and fail to grasp this essential distinction.

While Jefferson's refusal to issue Thanksgiving proclamations as President would, at first blush, appear inconsistent with this point, he explained his decision precisely in terms of coercion. In a letter to Rev. Samuel Miller, President Jefferson stated that he had no authority "to prescribe" or "to direct" the "religious exercises of his constituents." Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808) (hereinafter "Letter to Miller"), in Kurland, *supra* p. 14, at 98, 98-99. Jefferson disagreed with the argument that a Thanksgiving proclamation would be merely recommendatory: "It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion." *Id.* at 99. Jefferson made a similar point in his second inaugural address: "In matters of religion I have considered that

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[34] The letter opens with the statement "that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions . . . . ." Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1892) (hereinafter "Danbury Letter"), in Kurland, *supra* p. 14, at 96.

its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion, to *prescribe* the religious exercises suited to it. . . . " *Inaugural Addresses of the Presidents, supra* n.23, at 20 (emphasis added). Elsewhere in his second inaugural address, as previously discussed, *supra* n.26, Jefferson expressed his own religious sentiments and movingly sought God's blessings.

These statements make clear that Jefferson refrained from issuing Presidential Thanksgiving proclamations because he viewed them as coercive and thus "interdicted by the Constitution." Letter to Miller, in Kurland, *supra* p. 14, at 98. He obviously entertained no such objection to presidential expressions of personal religious belief, such as that contained in his second inaugural address. Thus, while one may disagree with Jefferson's view that a recommendatory Thanksgiving proclamation would nonetheless be coercive (as did the other Founders, and as we do below), one cannot disagree that Jefferson believed coercion to be a necessary element of a First Amendment violation.[35]

7. This Court's Decisions Prior To *Engel*

That government coercion of religious conformity was understood by the Framers to be a necessary element of an Establishment Clause violation should not startle the modern legal mind. Rather, until this Court's decision in *Engel*, the question of government coercion had been central to this Court's Establishment Clause jurisprudence. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 453 (1961) ("We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its

[35] Jefferson, in his second inaugural address, asked his countrymen to join him in "supplications" to God, which seems puzzling in light of his refusal to make similar requests in presidential Thanksgiving proclamations. Additionally, Jefferson had a federalism reason for refusing to issue Thanksgiving proclamations. He believed that authority to "prescribe" religious exercises was reserved to the states. *See* Letter to Miller, in Kurland, *supra* p. 14, at 98-99; *Inaugural Addresses of the Presidents, supra* n.23, at 20.

purpose . . . or its operative effect – is to use the States's coercive power to aid religion."); *Zorach v. Clauson*, 343 U.S. 306, 311 (1952) ("If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take religious instruction, a wholly different case would be presented."); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209 (1948) ("The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects."); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (The Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.").

Though *Engel* itself involved government coercion, 370 U.S. at 430-31, the Court's *dictum* that the purposes underlying the Establishment Clause "go much further" than prohibiting official coercive influence on religious belief, *id.* at 431, severed the key principle to which prior caselaw had been anchored. As we noted at the outset, the *Engel* Court did not intend to place the Establishment Clause on a collision course with the "many manifestations in our public life of belief in God." *Id.* at 435 n.21. But by breaking the link to coercion, *Engel* set the Establishment Clause on a path not imagined by that Court, to *Lemon* and judicial supervision over the location and relative size of creches, candy canes, talking wishing wells, Christmas trees, etc., etc., in official Christmas holiday displays.

As we will show below, *Lemon* and its progeny do not require invalidation of the graduation prayers challenged here. We turn first, however, to the question whether the Establishment Clause's safeguard against government coercion of religious conformity was violated by the invocation and benediction offered by Rabbi Gutterman.

B. There Was No Government Coercion In This Case.

We do not doubt that "[s]peech may coerce in some circumstances . . . . " *County of Allegheny*, 492 U.S. at 661

(Kennedy, J., concurring in the judgment in part and dissenting in part). But this case discloses no government action coercing religious conformity. Neither respondent nor his daughter were required to attend the graduation ceremony at Nathan Bishop Middle School, and, once there, they were in no way compelled, or even encouraged, to conform to the religious beliefs expressed by Rabbi Gutterman. Indeed, respondent has never claimed otherwise. Rather, his complaint is that he "is opposed to and offended by the inclusion of prayer in the public school graduation ceremony of his child both at the middle school and the high school level." J.A. 5. *See also* J.A. 18. Moreover, neither the district court nor the court of appeals suggested, much less found, that Providence school officials had engaged in even indirect coercion of anyone's religious beliefs. *See* App. 1a-30a.

Thus, this case came before the district court with no evidence even of "subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *County of Allegheny,* 492 U.S. at 659-60 (Kennedy, J., concurring the judgment in part and dissenting in part). Nevertheless, in the eyes of the district court, the simple "union of prayer, school, and important occasion" yielded an identification of religion with the public school, and so an Establishment Clause violation. App. 24a. As we show below, however, the combination of religious expression and the particular setting here cannot result in any government infringement of religious liberty prohibited by the Constitution. Religious speech alone cannot amount to the kind of government coercion of religious choice that implicates the Establishment Clause. And the setting here, a public secondary school commencement ceremony, does not add any of the coercive elements that could realistically turn Rabbi Gutterman's expressions of religious sentiment into instruments of religious compulsion.

1. Speech Alone Cannot Coerce Religious Choice

It bears repeating that the Framers themselves freely engaged in religious speech at the same time they were disabling government from using its power to coerce religious choice. Indeed, the Framers often used religious speech in the very instruments by which they disabled government's power to interfere with religious liberty. *See, e.g., Virginia Act for Establishing Religious Freedom,* in Kurland, *supra* p. 14, at 84. Clearly, the Framers were animated by the proposition, in Judge Easterbrook's modern phrasing, that "[s]peech is not coercive; the listener may do as he likes." *American Jewish Congress,* 827 F.2d at 132 (Easterbrook, J., dissenting). Though the Constitution may "prevent the government from using force or funds to aid or inhibit the practice of religion," at the same time "the government may participate as a speaker in moral debates, including religious ones." *Id.* Consistent with this notion, this Court has held that the government may encourage what it may not compel. *Harris v. McRae,* 448 U.S. 297 (1980), and may critically label expression that it may not otherwise burden, *Meese v. Keene,* 481 U.S. 465 (1987). *See also Block v. Meese,* 793 F.2d 1303, 1314 (D.C. Cir. 1986) (quoting L. Tribe, *American Constitutional Law* 588, 590 (1978)) ("[T]he guarantee of freedom of speech 'does not mean that government must be ideologically 'neutral,' ' or 'silence government's affirmation of national values,' or prevent government from 'add[ing] its own voice to the may that it must tolerate.' ".

Respondent's effort to silence speech that "offends" him is limited by no principle save each listener's unique sensibilities. It reduces to a rule that all "government speech about religion is *per se* suspect." *County of Allegheny,* 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). If that is the operative principle of the Establishment Clause, all references to God and to religion will have to be removed from civic life. "The holidays, the chaplains, the proclamations, the slogans, the oath, the pledge, and the creche alike give offense – to those of other faiths (or no faith) who feel slighted, to those of the same

faith who believe that governmental involvement with religion diminishes both institutions, to those who see the camel's nose." *American Jewish Congress*, 827 F.2d at 133 (Easterbrook, J., dissenting).[36]

Again, we do not deny that "[s]peech may coerce *in some circumstances*," *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added), but it is only by virtue of the particular circumstances surrounding speech that government expression may be transformed into a power to interfere unconstitutionally with religious choice. Thus, in *Abington School Dist.*, 374 U.S. at 223, Bible reading was "prescribed as part of the curricular activities of students who are required by law to attend school." In *Illinois ex rel. McCollum*, 333 U.S. at 209-10, students "compelled by law to go to school for secular education [were] released in part from their legal duty upon condition that they attend the religious classes." And in *Engel*, 370 U.S. at 430, children were similarly compelled by law to attend class, presented with a state-composed prayer, and given an option to be excused from its recitation – an option available in the circumstances only at the price of the "ridicule and ostracism of their peers for nonconformity." *American Jewish Congress*, 827 F.2d at 134 (Easterbrook, J., dissenting).[37]

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[36] Moreover, grounding a restraint of religious expression on the offense that may be taken by a listener is radically alien to this Court's First Amendment jurisprudence protecting other forms of speech. *See, e.g., Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens must tolerate insulting, even outrageous, speech. . . . "); *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (noting the Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience"). As Justice Harlan noted, "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576 (1969). Given that the First Amendment singles out a particular form of speech, religious expression, for special protection, it would be an odd result indeed to exclude religious speech from the scope of this principle that safeguards all other forms of expression.

[37] Looking to context to evaluate unconstitutional coercion is a familiar approach of this Court in many other areas outside of Establishment Clause

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In short, the facts that religious speech occurred on a government platform, was uttered by a government-sponsored speaker, and offended one (at least) member of the audience cannot by itself work a violation of the Establishment Clause.

2. Attendance At The Graduation Ceremony Was Voluntary

The setting in which the religious speech occurred here reveals no government "pressure upon a student to participate in a religious activity." *Board of Educ. v. Mergens*, 110 S.Ct. 2356, 2378 (Kennedy, J., concurring in part and concurring in the judgment). Attendance at the Nathan Bishop Middle School's graduation ceremony was entirely voluntary. J.A. 18.[38]

This case is thus unlike the classroom prayer context at issue in *Engel*. There, the state used its coercive power to compel attendance of students in the classroom. To be sure, nonattendance for religious reasons was excused if the student was willing to endure the stigma of nonconformity associated with leaving the class. The student was put to this difficult choice by virtue of the state's mandatory attendance requirement, because the student was required to be present in the classroom in the first instance. In other words, the costs to

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jurisprudence. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), for example, the availability of criminal sanctions for distribution of allegedly pornographic material and government officials' threats to institute criminal proceedings resulted in "a scheme of state censorship effectuated by extralegal sanctions." *Id.* at 72. To determine when official action constitutes a Fourth Amendment seizure, courts must "assess the coercive effect of police conduct." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). A seizure occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

[38] This fact has figured prominently in lower court decisions rejecting Establishment Clause challenges to public school graduation prayers. *See, e.g., Albright*, slip op. at 16 (secondary school graduation invocations and benedictions delivered in "voluntary and non-coercive circumstances"); *Wood*, 342 F.Supp. at 1295 ("[T]he fact that the graduation ceremony is not compulsory strips the function of any semblance of governmental establishment or even condonation.").

the student of leaving the classroom during the morning prayer (e.g., stigma, embarrassment, ostracism) were directly attributable to the state's law requiring the student's presence in the classroom in the first place. Absent the mandatory attendance requirement, there would be no government coercion. *See Mergens,* 110 S.Ct. at 2372 ("[T]here is little if any risk of official state . . . coercion where no formal classroom activities are involved.").

In contrast, graduates of the Nathan Bishop Middle School, as well as other schools in the Providence school district, were entirely free to stay away from the graduation ceremony; attendance was wholly voluntary. The coercive power of the state was not implicated at all.

Of course, graduates and their parents typically have a strong desire to attend their commencement exercises.[39] But a personal desire, no matter how strong or understandable, to attend some civic ceremony or function – whether it be a public school graduation ceremony, an inauguration ceremony or investiture, a legislative or judicial session, or whatever – simply does not amount to government compulsion to attend the event. Many people came from all over the country, some at great expense and personal sacrifice, to attend President Bush's inauguration ceremony. Still, no one was compelled by the government to attend the event. Those who did, did so voluntarily, despite the fact that the newly elected President would likely continue the inaugural tradition of seeking God's blessing. The strength of respondent's desire to attend his daughter's graduation ceremony does not entitle him to exclude from the proceedings any religious speech that he may find objectionable. A contrary rule would essentially

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[39] In *Smith v. Board of Educ.,* 844 F.2d 90 (2d Cir. 1988), an Orthodox Jewish senior, unable to attend his high school's Saturday commencement exercises due to religious structures, sought to compel a change in the day of the event. Noting that attending graduation was not a prerequisite to a student receiving a diploma, the Second Circuit rejected the student's claim with the observation that the "exercises are merely a social occasion on which students and their families and friends gather to mark an event." *Id.* at 94.

accord editorial privileges over the ceremony to any person desiring to attend it.[40]

3. The Religious Beliefs Of Those Who Attended The Ceremony Were Not Coerced

Quite apart from the voluntary nature of attendance at public school graduation ceremonies in Providence, it is clear that those who attended Nathan Bishop Middle School's graduation ceremony in 1989 were in no way coerced to accept or support the religious beliefs expressed by Rabbi Gutterman. "No one was compelled to . . . participate in any religious ceremony or activity." *County of Allegheny,* 492 U.S. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part). Unlike *Abington School Dist.,* in which the students were asked to stand and recite a prayer in unison, no one was required to join in, agree with, or even listen to Rabbi Gutterman's invocation and benediction.

That students and other children are in attendance at graduation ceremonies does not alter this analysis. Children also attend presidential inauguration ceremonies, legislative and court sessions, and countless other civic ceremonies and events in which religious values are expressed. That fact,

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[40] In addition, as the *Albright* court pointed out, though respondent and his daughter can speak of their desire to attend graduation without any invocation or benediction, the "same can be said in reverse as to graduating seniors who want such prayer." Slip op. at 9. One commentator elaborated:

> A student raised in a religious tradition who is taught the importance of prayer, who is exposed to public prayer at weddings, funerals, major governmental functions, and other significant transitional moments of life, may well be as firmly convinced that prayer at graduation, one of the most significant events in his or her life to date, is as essential as the non-believing student thinks it is not. Such a student may find a graduation without prayer incomplete, unfulfilling or downright offensive. The "believing" students' choice of foregoing graduation or "participating in a ceremony with which they have fundamental disagreement" is no less "odious" than that of the "unbelieving" student.

DuPuy, *supra* n.6, at 353.

standing alone, does not render all religious speech at such occasions coercive. Nor can graduation ceremonies be aptly analogized to the potentially coercive classroom context. The Sixth Circuit in *Stein* elaborated on the distinctions between graduation ceremonies and classroom instruction:

> Although children are obviously attending the ceremony, the public nature of the proceeding and the usual presence of parents acts as a buffer against religious coercion. In addition, the graduation context does not implicate the special nature of the teacher-student relationship – a relationship that focuses on the transmission of knowledge and values by an authority figure.

822 F.2d at 1409.[41]

To the *Stein* court's points we should add that graduation invocations and benedictions are but brief segments of a much longer, otherwise entirely secular, ceremony. In addition, school authorities do not themselves deliver these ceremonial acknowledgments of religion. They merely invite a private citizen to offer the invocation, authored by the speaker himself, just as they invite other speakers with different secular views to address the audience during the ceremony. Furthermore, though graduation exercises may be held on the premises of a school, J.A. 12-18; App. 19a, they are not part of the pedagogical activities of the school.

Underscoring the lack of coercive influences in the graduation ceremony setting is this Court's acknowledgment in *Mergens* that secondary school students understand "that schools do not endorse everything they fail to censor." 110

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[41] *See also Jones,* slip op. at 13 (Graduation is "an assembly where many parents are present rather than a classroom setting, where the prospect of subtle official and peer coercion warrants stricter separation of the state from things religious."); *Grossberg,* 380 F.Supp. at 288 (In graduation exercises, "[t]here is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases."); *Wood,* 342 F.Supp. at 1294 ("[G]raduation ceremonies . . . are ceremonial and are in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance."); *Wiest,* 320 A.2d at 367 (Roberts, J., concurring) (noting "the public and ceremonial nature of the occasion and the presence of students and adults of all persuasions").

S.Ct. at 2372. *See also Jones,* slip op. at 12 ("The graduation ceremony lies on the threshold of high school students' transitions into adulthood, when religious sensibilities hardly constitute impressionable blank slates."); *Albright,* slip op. at 21 ("[H]igh school students are not 'babes in arms' and . . . are mature enough to understand that a school does not endorse or promote a religion by permitting prayer. . . . ").

Just as attendees at Nathan Bishop Middle School's 1989 graduation need not accept or support the religious beliefs expressed in Rabbi Gutterman's invocation and benediction, so also

> [t]he holder of a nickel need not trust in God, no matter what the coin says, and need not contribute the nickel (or even three pence) to a church. He may labor on Christmas if he likes – though Ebenezer Scrooge had to give Bob Cratchit that day off without governmental compulsion. He may "affirm" rather than "swear" when giving testimony and be silent while others say the Pledge of Allegiance. . . . He need not study or even own a Bible during the "Year of the Bible." And he may turn his back on the creche.

American Jewish Congress, 827 F.2d at 133 (Easterbrook, J., dissenting). If Rabbi Gutterman's prayers are held to coerce religious conformity among members of his audience, and thus to be unconstitutional, a staggering variety of traditional and venerable acknowledgments of religion must be extirpated from our public life. It must follow, for example, that this Court's Crier coerces religious conformity when he opens oral argument sessions. There is no principled distinction.

In sum, the religious speech challenged here is devoid of any element of government coercion that could interfere with the religious liberty of the audience. Accordingly, petitioners have committed no offense against "the great object" of the Religion Clauses: the "freedom to worship as one pleases without government interference or oppression." *County of*

Allegheny, 492 U.S. at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part).[42]

II. *Lemon v. Kurtzman* Does Not Require Invalidation Of The Venerable Tradition Of Graduation Invocations And Benedictions

The courts below held that the graduation invocations and benedictions at issue here had the principal effect of advancing religion – the second prong of the *Lemon* analysis – and so violated the Establishment Clause. App. 23a. As a result, they did not address the other two components of *Lemon.*[43]

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[42] Since inclusion of a traditional, brief invocation and benediction in commencement exercises does not effect an unconstitutional coercion of religious choice, exclusion of speech because of its religious content would seem to violate the free speech and free exercise rights of the speaker and his audience. *See, e.g., Widmar v. Vincent,* 454 U.S. 263, 276 (1981). Similarly, depriving students who are religious of this kind of expression at their graduation solely because it is religious signals a government disapproval of religion that is also contrary to the Establishment Clause. *See County of Allegheny,* 492 U.S. at 660 (O'Connor, J., concurring in part and concurring in the judgment). Accordingly, it is well to recall here Justice Brennan's admonition: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

[43] The graduation prayers in this case pass muster under the other two elements of the *Lemon* test. First, these prayers have "the secular purpose of solemnizing the occasion." *Albright,* slip op. at 17. *See also Jones,* slip op. at 8 (Graduation "invocations addressing a deity" are "as consistent with the secular solemnizing purpose as any religious purpose."); *Stein,* 822 F.2d at 1409 ("The invocation and benediction at a graduation ceremony serves the 'solemnizing' function. . . . "). In addition, they serve the legitimate and important purpose of providing "recognition and acknowledgment of the role of religion in the lives of our citizens." *County of Allegheny,* 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment). Second, no government action threatens excessive entanglement with religion. Neither the Providence School Committee

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The holding below rested on the conclusion that "[t]he special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice." App. 25a. As we have candidly admitted above, we cannot in good conscience urge that this application of *Lemon* was wholly unfaithful to that precedent. Yet examination of the subsequent development of *Lemon* – notably this Court's warnings concerning its limits – suggests that a more accurate vision of the Establishment Clause as seen through the lens of *Lemon* would approve of the kind of graduation prayers at issue in this case.

The courts below were certainly correct that one iteration of the "effects" prong of *Lemon* focuses on whether a governmental practice appears to endorse or sponsor religion through "a close identification" of government power with religious activities. *Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 389 (1985). Yet they then went on to apply the *Grand Rapids* "close identification" notion untempered by this Court's Establishment Clause teaching in other major precedents. Thus the courts below were able to follow a rather simple recipe for their judgment in this case. As the district court put it, "It is the union of prayer, school, and important occasion that creates an identification of religion with the

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nor the Superintendent requires prayer to be included in graduation ceremonies in the school district. J.A. 18. Though guidelines for such prayer are distributed to the schools, those guidelines are not formulated by government officials, the prayers are prepared by outside clergy, and no government review or monitoring of the prayers is involved. *See Jones,* slip op. at 15 (noting that even review by school officials of invocations for sectarianism and proselytization does not constitute excessive entanglement). Far from being the kind of "comprehensive, discriminating, and continuing state surveillance" prohibited by *Lemon,* 403 U.S. at 619, the guidelines distributed here are akin to the guidelines for public schools' Christmas assemblies upheld in *Florey v. Sioux Falls School Dist. 49-5,* 619 F.2d 1311 (8th Cir.), *cert. denied,* 449 U.S. 987 (1980), which the court concluded served to avoid, rather than create, excessive entanglement with religion. *Id.* at 1318. Moreover, ongoing government surveillance of graduation speakers to censor any reference to the deity necessarily involves an equal or greater degree of religious entanglement.

school function." App. 24a. In other words, add religious expression to an important civic event and you have a violation of the Establishment Clause.

In contrast, this Court has never embraced such an absolute analysis. *Lemon* itself did "not call for total separation between church and state." 403 U.S. at 614. *See also Committee for Public Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation . . . ."); *Wallace,* 472 U.S. at 69 (O'Connor, J., concurring in the judgment) (noting that "[c]haos would ensue" if every statute that promotes a secular goal but also has "a primary effect of helping or hindering a sectarian belief" were invalidated under the Establishment Clause). To the contrary, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984). As a result, this Court has warned that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.* at 680.

This is the warning ignored, and the error made, by the courts below. The district court forthrightly observed that, in its view, "the Establishment Clause would not be implicated" by the "exact same invocation" if "God would be left out." App. 28a. To underscore this point, the court then recast Rabbi Gutterman's invocation into a court-approved version, deleting only references to God. App. 28a n.10.

With such narrow reasoning, the courts below failed to employ the broader analysis mandated by this Court for application of the *Lemon* standards. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring). It is true that God could be "left out" of the invocation and benediction at issue here. So too could God be left out of the invocation that has traditionally opened this Court's sessions. But the availability of a more secular alternative has never been deemed relevant to the Establishment Clause inquiry. *Lynch,* 465 U.S. at 681 n.7. *See also County of Allegheny,* 492

U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment) (observing that a "more secular alternative" test "is too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented by each case").

Examination of the circumstances of the graduation prayer here does not support the conclusion that such ceremonies produce a "close identification" of government with religion. Including such invocations and benedictions in commencement ceremonies vastly predates the existence of American public schools, and a format for such proceedings was well established by the time government entered education.[44] Clearly, communal traditions, not government action, have been the impetus for including such elements in graduation ceremonies.

In Providence, the School Committee and Superintendent have left the decision to each school whether to include an invocation and benediction in graduation exercises, with the result that some ceremonies have included such prayers, while others have not. J.A. 4, 12-16, 18, 24; App. 19a. No government official prepares or delivers these prayers, though guidelines for prayer at public civic ceremonies from the National Conference of Christians and Jews are provided to the clergy invited to deliver them. J.A. 12-15; App. 19a. In addition to this passive government role, graduation or promotion ceremonies obviously occur only once in a student's career at a school, and an invocation or benediction is merely a brief part of each ceremony.[45] Moreover, the ceremonies are removed from the usual pedagogical setting of the classroom, where attendance is compulsory and authoritative instruction is the normal order of the day. Graduation ceremonies take place rather in a voluntary assembly in which family and friends

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[44] K. Sheard, *supra* n.7, at 71; DuPuy, *supra* n.6, at 358.

[45] *See Jones,* slip op. at 13 (noting the brief duration of commencement prayers as part of the Fifth Circuit's conclusion that they do not constitute government endorsement of religion); *Grossberg v. Deusebio,* 380 F.Supp. 285, 289 (E.D. Va. 1974) ("The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated.").

may accompany the student in this traditional coming-of-age celebration.

This context bears little similarity to those situations in which this Court has invalidated government action under *Lemon* for conferring an "imprimatur of state approval on religious sects or practices." *Widmar v. Vincent,* 454 U.S. 263, 274 (1981). *See, e.g., Grand Rapids School Dist.,* 473 U.S. 389-392 (1985) ("symbolic union" between church and state where students move back and forth between religious and "public school" classes in the same private school building, and public school teachers may appear to be "regular adjunct[s]" to the religious school); *Abington School Dist.,* (Bible readings part of prescribed curriculum; conducted under supervision of teachers; children may be excused from classroom during reading); *Engel* (state-drafted school prayer); *Illinois ex rel. McCollum v. Board of Educ.,* 333 U.S. 203 (1948) ("release time" program for religious instruction on public school grounds; nonparticipating students kept at school for secular work.).

The extremely limited role of religion in graduation exercise in the form of this invocation and benediction does not constitute a government endorsement of religion as understood in this Court's cases. Neither the texts of the invocation and benediction – in the district court's words, "examples of elegant simplicity, thoughtful content, and sincere citizenship" App. 20a – nor the circumstances of their delivery should they be construed as "making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny,* 492 U.S. at 594, quoting *Lynch,* 465 U.S. at 687 (O'Connor, J., concurring). The courts below found government endorsement here simply by virtue of the school's failure to censor references to the deity, as its revision of the invocation so unmistakably demonstrates. Such a notion cannot be squared with this Court's contrary view that "schools do not endorse everything they fail to censor." *Mergens,* 110 S.Ct. at 2372.

In sum, in our constitutional order, such acknowledgements of religion achieve the completely legitimate ends of "solemnizing public occasions, expressing confidence in the

future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch,* 465 U.S. at 693 (O'Connor, J., concurring). *Lemon* should not be read, as did the courts below, to prevent Americans from choosing, as they have for two centuries, to use religious expression in such a role.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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